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IN THE

Supreme Court of Virginia

AT RICHMOND

3

RECORD NO. 791415

B. DENNIS COSTNER and
REBECCA COSTNER,

.....Appellants

v.

CHESTER LEE LACKEY and
SUZANNE LACKEY,

.....Appellees

APPENDIX

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VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ROANOKE

B. DENNIS COSTNER and REBECCA COSTNER, Plaintiffs	)	
v.	)	PETITION FOR ATTACHMENT
CHESTER LEE LACKEY and SUZANNE LACKEY, jointly and severally, 5553 Sweet Fern Drive, N. W. Roanoke, Virginia, Defendants	)	

I

Your petitioners, B. Dennis Costner and Rebecca C. Costner, respectfully show unto the Court that the said principal defendants, Chester Lee Lackey and Suzanne Lackey, are justly and truly indebted to the plaintiffs, individually and severally, in the sum of $18,437.98, which amount is past due and payable as of September 28, 1978, and the full particulars of which indebtedness are as follows:

II

(Count I)

1. That on or about October 12, 1978 Barney D. Costner and his wife, Rebecca C. Costner, transferred Lot 1, Block 1, according to the plat of Section 1, Meadow Wood Estates, dated June 13, 1972, prepared by T. P. Parker & Son, Virginia Certified Engineers and Surveyors, of record in Plat Book 8 at page 23 in the Office of the Circuit Court of Roanoke County, Virginia to Chester Lee Lackey and Suzanne Lackey, husband and wife, as tenants by the entirety with the right of survivorship as at common law.

2. That said deed was recorded in the Clerk's Office for the Circuit Court of Roanoke County.

3. That the consideration for the transfer of property was the assumption of a first deed of trust in the original principal amount of $51,100.00 made by Barney D. Costner and Rebecca C. Costner, husband and wife, to W. Courtney King and C. John Renick, Trustees, securing Peoples Federal Savings and Loan Association, dated January 17, 1978, of record in Deed Book 1084, page 268, in the Clerk's Office, Circuit Court, County of Roanoke, Virginia, and, in addition, the payment of a note for $8,987.98, dated the 28th day of September, 1978, bearing interest at the rate of 8% and payable on demand.

4. That the obligation of $8,987.98 dated September 28, 1978 was witnessed by an unsigned note attached hereto as Exhibit A.

5. That demand has been made by the plaintiffs on the defendants for the payment of $8,987.98 and has been refused.

6. That payment is now due.

III

(Count II)

7. That on or about September 28, 1978 the plaintiffs delivered furniture in the amount of $9,450.00 to the principal defendants for which payment was immediately due.

8. That said obligation was to be witnessed by a note which the defendants refused to sign.

9. That demand has been made by the plaintiffs on the defendants for the payment of $9,450.00 for the furniture, and

they have been refused.

10. That payment was due September 28, 1978 and is now overdue.

IV

The plaintiffs are entitled, therefore, and ought to recover from the principal defendants $18,437.98 with interest thereon from the 28th day of September, 1978 until paid.

V

Your petitioners further allege that the said principal defendants:

(1) Are removing or are about to remove out of this Commonwealth with intent to change their domicile; and

(2) They intend to remove or are removing or have removed their estate, or a material part of their estate, out of this Commonwealth, so that there will probably not be therein effects of such debtors sufficient to satisfy the claim when judgment is obtained therefor, should only the ordinary process of law be used to obtain the judgment.

(3) That the principal defendants have already removed certain articles of personal property from their residence and have secreted said assets somewhere within the City of Roanoke on a temporary basis and have made arrangements for the transfer of said property out of the state.

(4) That removal of said personal property transpired after demand for the payment of debts had been made by the plaintiffs upon the defendants.

WHEREFORE, your petitioners ask for an attachment against the estate, real and personal, of said principal defend-

ants in the State of Virginia, that the said real and personal property, or so much thereof as may be necessary to satisfy the claim of your petitioners be sold by order of this Court and applied in satisfaction thereof, and that your petitioners may have all such other and further relief as the nature of this case may require.

B. Dennis Costner

STATE OF VIRGINIA

CITY OF ROANOKE, To-wit:

I, Dianne Flake, a notary public for the city and state aforesaid, certify that B. Dennis Costner, agent for I. M. E., Inc., has personally appeared before me in my jurisdiction aforesaid and made oath that he is cognizant of the facts stated in the foregoing petition and that they are true.

Given under my hand this 1st day of March, 1979.

Dianne Flake
Notary Public

My commission expires October 3, 1981

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ROANOKE

B. DENNIS COSTNER, and REBECCA COSTNER, Plaintiffs	)	
v.	)	A N S W E R
CHESTER LEE LACKEY, and SUZANNE LACKEY, Jointly and Severally, Defendants	)	

Come now the Defendants, Chester Lee Lackey and Suzanne Lackey, Jointly and Severally, and for their Answer to the Petition for Attachment heretofore filed, state as follows:

I.

The Defendants deny the allegations contained in Paragraph I.

II.

(Count I)

1. The Defendants admit the allegations contained in paragraph 1 of Count I.

2. The Defendants admit the allegations contained in paragraph 2 of Count I.

3. The Defendants admit the allegation of the consideration of $51,100.00, but deny any other allegations for consideration in paragraph 3 of Count I.

4. The Defendants deny all allegations contained in paragraphs 4, 5, and 6 of Count I.

III.

The Defendants deny all allegations contained in Count II of the Petition for Attachment.

IV.

The Defendants deny all allegations contained in paragarph IV of the Petition for Attachment.

V.

The Defendants deny the allegations contained in paragraph V and state that the furniture which is the subject of Count II is being store in the State of Virginia and will remain stored in the State of Virginia until the resolution of this litigation.

The Defendants deny that the Plaintiffs are entitled to a lien of attachment and ask that this suit be dismissed.

WHEREFORE, your Defendants, Chester Lee Lackey, and Suzanne Lackey, jointly and severally, pray this Honorable Court dismiss this action.

CHESTER LEE LACKEY, and SUZANNE LACKEY

By _____
Of Counsel

Charles L. Williams, Jr.
GENTRY, LOCKE, RAKES & MOORE
800 Colonial Plaza
P.O. Box 1018
Roanoke, Virginia 24005

Counsel for Defendants

BY THE COURT: B. Dennis Costner and Rebecca Costner, Plaintiffs, against Chester Lee Lackey and Suzanne Lackey. Are the Plaintiffs ready to proceed?

BY MR. T. J. WILLIAMS: Yes, Your Honor, we are.

BY THE COURT: Are the Defendants ready?

BY MR. C. L. WILLIAMS: Yes, sir.

BY THE COURT: All parties who will testify in this matter now before the Court, please stand and be sworn by the Clerk, all parties.

ALL WITNESSES DULY SWORN BY THE CLERK

BY THE COURT: It is the Court's understanding that the Parties by counsel wish to waive a trial by jury and submit the matter to the Court without intervention of a jury trial.

BY MR. C. L. WILLIAMS: Yes.

BY MR. T. J. WILLIAMS: Yes, Your Honor.

BY THE COURT: Do you wish to make any preliminary statements?

BY MR. T. J. WILLIAMS: Opening statement.

BY MR. C. L. WILLIAMS: Opening statement.

BY THE COURT: Call your first witness.

BY MR. T. J. WILLIAMS: Your Honor, we'd like to call Mr. Costner to the stand.

DENNIS COSTNER, A WITNESS OF LAWFUL AGE, HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION
BY MR. T. J. WILLIAMS:

Q. Mr. Costner, would you state your name and

address, please.

A. Dennis Costner, Route 5, Shelby, North Carolina.

Q. Mr. Costner, what is your occupation presently?

A. I'm working as a financial consultant with my father.

Q. In selling furniture?

A. Yes, sir.

Q. Mr. Costner, do you know the defendants, Mr. Chester Lackey and Suzanne Lackey?

A. Yes, sir.

Q. How do you know them?

A. I first met Mr. Lackey back in the summer of '78 when he spoke at a business session. Then in the months of Septem--August and September of '78 we were in negotiations to enter in to a working arrangement for him to take over the position of vice-president of marketing for IME and since that date--from that date until--the 1st of September--until the end of March he was a vice-president for my firm.

Q. Now that firm is IME, Inc.?

A. That's correct.

Q. Trading under the name of International Marketing and Engineering?

A. That's correct.

Q. That firm is presently in bankruptcy or in Federal District Court, is it not?

A. That's correct.

Q. When did the firm enter in to bankruptcy and

cease business?

A. March the 23rd of this year.

Q. When did Mr. Lackey's employment begin with IME, Inc.?

A. September 1 of '78.

Q. And when was it terminated?

A. March 14th of this year.

Q. What were the circumstances of that termination?

BY MR. C. L. WILLIAMS: Judge, I'm going to object to this. They're suing on two alleged contracts and I don't know that employment with Mr. Lackey is really relevant here.

BY THE COURT: Unless it relates to the contract sued on, I don't think it does.

BY MR. T. J. WILLIAMS: It's very broad, Your Honor, I'm going to withdraw the question right now and go in to the merits of the suit.

BY THE COURT: All right.

BY MR. T. J. WILLIAMS: It may become important later.

Q. (Mr. T. J. Williams continuing) Mr. Costner, did you enter in to a contract to sell real estate to Mr. and Mrs. Lackey?

A. Yes.

Q. When did that contract come in to being?

A. It was verbally in the month of September and then it was a signed contract in October, '78.

Q. September of 1978?

A. Yes.

Q. Who was resid--was this a residence?

A. Yes, it was.

Q. Where is the residence located?

A. 5553 Sweet Fern Drive, northwest, Roanoke--

Q. Is that--

A. --Roanoke County.

Q. --Roanoke County?

A. Yes, sir.

Q. Had you previously occupied that residence?

A. Yes, I had.

Q. Did the Lackeys move in to that residence?

A. Yes, they did.

Q. When did they move in?

A. September the 28th of 1978, the day before of which I moved out. I moved in to a motel to accomodate them till my new residence was completed.

Q. Mr. Costner, I'm going to hand you a document and I ask you have you seen this document before?

A. Yes, sir.

Q. Is it two pages?

A. Yes, sir.

Q. Is it dated October 1978?

A. Yes, sir.

Q. What is this document I've handed you?

A. It's a--uh--document of the sale of the property and offer to purchase and the dollar amounts included

and the facts, conditions concerning the sale of that residence.

Q. Now, I ask you, Mr. Costner, to turn to page two of that document and you'll see four signature lines.

A. Yes, sir.

Q. Did you sign this document?

Q. Is that your wife's signature?

A. Yes, sir.

BY MR. T. J. WILLIAMS: I'm sorry, excuse me, for the record, the copy that Mr. Williams has is an unsigned copy, Your Honor. The original I do have here and I haven't had time to make copies of it.

BY MR. C. L. WILLIAMS: I've never seen it, so I just wanted---.

BY MR. T. J. WILLIAMS: Let me show it to counsel to satisfy his curiosity.

MR. T. J. WILLIAMS AND MR. C. L. WILLIAMS HAVE WHISPERED CONFERENCE CONCERNING DOCUMENT

Q. (Mr. T. J. Williams continuing) Mr. Costner, I re-hand you that document that you've just described. Turn to page two, are you familiar with your wife's signature?

A. Yes, sir, I am.

Q. Is that her signature on page two?

A. Yes, sir.

Q. Now you see two more signatures, allegedly the signatures of Mr. and Mrs. Lackey, do you recognize Mr. Lackey's signature?

A. Mr. Lackey's signature, I do; I've never seen

Mrs. Lackey's signature other than on this document.

Q. Did you see her sign that document?

A. No, my wife had her to sign this document at that residence.

Q. But you do recognize the signature of Mr. Lackey?

A. Yes, sir.

Q. From your course of business dealings with him in the past?

A. Yes.

BY MR. T. J. WILLIAMS: Your Honor, we would like to have this marked as Exhibit 1 for the Plaintiff.

BY THE COURT: Any objection?

BY MR. C. L. WILLIAMS: Judge, I'd like to reserve the right to cross examine this witness about this document and with that possible reservation, I don't have any other--

BY THE COURT: All right.

BY MR. C. L. WILLIAMS: --objection.

BY THE COURT: Exhibit 1, subject to cross examination.

Q. (Mr. T. J. Williams continuing) Mr. Costner, I'm going to hand you a copy of Exhibit 1 that is unsigned and leave the signed copy in the possession of the Court.

A. Yes, sir.

Q. This unsigned copy of Exhibit 1, does that provide for the purchase terms?

A. Yes, it does.

Q. And the sales price, is it recited?

A. Yes.

Q. In paragraph two?

A. That's correct.

Q. At how much?

A. Fifty-nine thousand.

Q. Was it to be offset by the first deed of trust?

A. Yes, sir.

Q. And what institution had that first deed of trust?

A. Peoples Federal Savings and Loan here in Roanoke.

Q. Thank you. Mr. Costner, when was this real estate transaction closed?

A. To the best of my recollection, December the 28th of last year.

Q. Do you recall who closed the transaction?

A. The offices of King, Fulghum, Renick, Bounds and Smith.

Q. Were you present at the closing?

A. No, sir.

Q. Mr. Costner, I'm going to hand you another document in a minute but first I'm going to show it to counsel.

MR. T. J. WILLIAMS AND MR. C. L. WILLIAMS HAVE WHISPERED CONFERENCE CONCERNING DOCUMENT

Q. (Mr. T. J. Williams continuing) Mr. Costner, you can not now recall all the figures that you saw on that closing statement, can you?

A. No, sir, I don't know the pro rata figures on taxes.

Q. Did you receive a Seller's Statement?

A. Yes, sir.

Q. Settlement Statement?

A. Yes, sir.

Q. If I show that Seller's Statement to you, will it refresh your memory?

A. Yes.

BY MR. T. J. WILLIAMS: Your Honor, I'd like to show it for purposes of refreshing his memory.

Q. (Mr. T. J. Williams continuing) Mr. Costner, I hand you a document entitled "Seller's Settlement Statement." Does this accurately refresh your memory as to the terms of the disclosure statement, of the settlement statement?

A. Yes, sir, it does.

Q. And what figure does it--does your mind reflect now or reconsider now as being the amount due you at the settlement?

A. Eighty-two hundred eighteen dollars and ninety-seven cents plus the--at the time of the settlement, plus the amounts of the interest and the principle decrease made by me between September and December.

Q. So you recall now that the amount due you was

eight thousand two hundred and eighteen dollars and ninety-seven cents at the date of the closing?

A. That's correct.

Q. Now again to refresh your memory, the taxes were pro-rated as of September 28th, 1978, on this settlement statement, were they not?

A. That's correct.

Q. And the insurance and the interest as well?

A. That's correct.

Q. And you've testified that you continued to make payments and assume these costs from September 28th through December 28th, 1978?

A. I believe the records would show that I made two of those three payments, I think Mr. Lackey finally made the December payment. I think that amount is reflected in the note that we had prepared.

Q. Mr. Costner, the amount sued for was eighty-nine hundred eighty-seven dollars?

A. Yes, sir.

Q. The settlement statement showed a figure of eight thousand two hundred and eighteen dollars and ninety-seven cents due you?

A. Yes, sir.

Q. A difference of seven hundred and sixty-eight dollars and three cents?

A. Yes, sir.

Q. How does that additional amount accrue?

A. That would be the interest difference between--on the two month--monthly payments that I made to Peoples Federal which were in the amounts of four hundred and forty-four dollars each.

Q. Principle and interest was four hundred and forty-four dollars each?

A. Principle, interest, and taxes.

Q. And you made them for the months of October and November?

A. That's correct.

Q. And so the additional seven hundred and sixty-eight dollars and three cents asked for in your Motion for Judgment or your Attachment proceeding is the interest that you paid during those months?

A. That's correct.

Q. Did Mr. Lackey make any payments to you during those months?

A. No, sir.

Q. On this--on this residence?

A. No, sir.

Q. Mr. Costner, did you at any time ask for any evidence of this indebtedness from Mr. Lackey?

A. I don't know that it was ever specifically asked for, it was a mutual understanding as far as I knew that there would be a note signed but there was never anything asked for to my reas--my recollection.

Q. Now in your conversations with Mr. Lackey

from September through December of '78, what arrangement had you come to, if any, for the payment of this sum?

A. First of all that he would--uh-try to secure a second mortgage to take care of the difference or that he would approach the bank in the area or banks in the area and try to borrow the "X" amount of dollars for both contracts and pay me in full. When that arrangments was not finalized on that basis and could not be arranged, then I agreed to accept some sort of a monthly amount until it could be paid out within a six month period of time, which we both mutually agreed to.

Q. Paid over a six month period of time?

A. Yes. Out of wages earned.

Q. Working for IME, Inc.?

A. That's correct.

Q. You're president of that corporation or were?

A. That's correct.

Q. Did you, in fact, present a note for signature to Mr. Lackey and Mrs. Lackey?

A. I don't know whether it was ever presented to Mr. and Mrs. Lackey or one of them or not. I do know I had the note prepared by your offices, I don't know that it was ever presented to either of them or both of them. At some point in time after the note was prepared, it became a very touchy situation because of possible termination, I didn't want any further conflict.

Q. Possible termination of Mr. Lackey's employ-

ment?

A. That's correct.

Q. From December 28th, 1978, to the present, have any payments been made on that residence? Or on the amount owed to you?

A. Not on the amount owed me, no, sir.

Q. Have you made demand of Mr. and Mrs. Lackey for the payment of these sums?

A. Yes.

Q. Mr. Costner, in connection with the contract of September 28th, 1978, for the sale of the house, did you have occasion to also sell personal property, namely furniture, to Mr. and Mrs. Lackey?

A. Yes, sir.

Q. Was that furniture your furniture?

A. Yes, sir. My wife and mine's.

Q. What was your discussion with Mr. Lackey about the sale of that furniture?

A. Discussed with Mr. Lackey first when he was here for the interview for the job position and then he said that at that time that--uh--he would leave the final decision on what items to be left to his wife's discretion at the time she would arrive in Roanoke. At which time my wife and Mrs. Lackey went over the items, we came up with a price and we agreed on that price after she arrived in Roanoke.

Q. After Mrs. Lackey arrived in Roanoke?

A. That's correct.

Q. The items were selected individually?

A. Yes.

Q. What was the price arrived at?

A. Nine thousand originally and then they decided on one other bedroom suit which was nine hundred and fifty, so it made it ninety-nine hundred and fifty dollars.

Q. When was this arrived at, what date?

A. That would've been around the 1st of October.

Q. 1978?

A. Yes, within the first two weeks of October, I don't know the exact date.

Q. Were any of these negotiations reduced to writing?

A. No, sir.

Q. Did you ask Mr. and Mrs. Cost--Mr. and Mrs. Lackey to sign a note or any evidence of indebtedness?

A. I don't know that they were asked specifically to do that, they may have been.

Q. How were they to repay or pay this sum of money you've mentioned?

A. That was to be paid along with the difference owed in the first mortgage and the sales price of the residence by borrowing from the bank, by transferring their funds from out of state when they moved in or, after that, neither one of those fell through or all those fell through that they would incorporate that amount into a dollar figure which to pay out the balance on both of them within six months.

Q. Have any sums of money been paid on this nine thousand nine hundred and fifty dollars?

A. Yes, sir.

Q. How much?

A. Five hundred.

Q. Who--was that paid by check?

A. That was paid by check to me.

Q. Do you recall who wrote the check?

A. Mr. Lackey.

Q. When was that paid?

A. I believe it was the 1st of February.

Q. Of this year?

A. Yes, sir.

Q. How much remains due on that?

A. Nine thousand four hundred and fifty dollars.

Q. Do you claim interest on that account?

A. Yes, sir.

Q. From what date?

A. From September the 28th when they took possession of it.

Q. 1978?

A. Yes, sir.

Q. Has any of the furniture been returned to you?

A. No, sir.

Q. Mr. Costner, did you mention that Mr. Lackey was to pay some of this out of proceeds of his employment

with IME?

A. Yes, sir.

Q. From September through March, from the date of employment of Mr. Lackey to IME through the date of his disassociation with that corporation, how much money did he earn through IME?

BY MR. C. L. WILLIAMS: I object to that, Your Honor.

BY THE COURT: Overruled, if he was to pay it out of the proceeds of his earnings.

A. (Witness continuing) Approximately forty to forty-two thousand dollars in that six month period of time.

Q. Mr. Costner, have you had occasion to go by the residence and check on the furniture that you sold to Mr. Lackey?

A. Yes, sir.

Q. Can you recall or do you know now whether it's there at the residence?

A. No, sir, it's not.

Q. Did you have an attachment levied at that residence?

A. Yes, sir.

BY MR. T. J. WILLIAMS: Your Honor, I have no further questions of this witness, he's subject to cross examination.

BY THE COURT: Let me ask if you had it attached, is it in the hands of the Sheriff then, if it's not in the residence or do you know where it is?

BY THE WITNESS: No, sir, I do not have any knowledge where

it's at. I've been told it was with a storage firm but I don't know which one or where it's at.

BY MR. T. J. WILLIAMS: Your Honor, that's--if I may say for the record, we have been told by Mr. Williams that it has been stored for the purposes of selling the house in the interim. It's not _____ but we did not present that because it's hearsay as far as we're concerned.

BY THE COURT: You asked if it had been attached and I didn't know whether it had ever been successfully attached or not, is that correct?

BY MR. T. J. WILLIAMS: The record will show, Your Honor, that it has been levied on and the levy list of the Sheriff is probably in the record, but it has been. If Your Honor would like for me to pursue that, I will but I know with judicial notice the attachments are in the record.

BY THE COURT: So then if it's stored, is it stored at the direction of the Sheriff or what? I don't know.

BY MR. T. J. WILLIAMS: Your Honor, we don't know, that'll have to be gleaned from Mr. Lackey.

BY THE COURT: Well, if the Sheriff attached it, it would be the Sheriff's responsibility.

Q. (Mr. T. J. Williams continuing) Mr. Costner, have you given any directions to the Sheriff as to the disposition of this property?

A. No, sir.

Q. When it was attached, this property was located at the premises on Sweet Fern Drive?

A. That's correct.

Q. In addition to a vehicle that was located there?

BY MR. C. L. WILLIAMS: Only the Sheriff would know that, Judge.

BY THE COURT: Well, that's what I'm trying to find out.

BY MR. T. J. WILLIAMS: Well, I have no further questions of this witness, Your Honor.

BY THE COURT: All right.

BY MR. C. L. WILLIAMS: Could I see Exhibit 1 for just a moment, please?

CROSS EXAMINATION
BY MR. C. L. WILLIAMS:

Q. Mr. Costner, let's look at this exhibit again. This is an undated contract, is it not?

A. The top part is undated, the second page is dated.

Q. Is dated?

A. Yes, sir. The closing happened on October the 13th.

Q. But the contract isn't dated?

A. No. It's dated only October, 1978.

Q. Then do you testify under oath that you signed that contract?

A. Yes, sir.

Q. Did you see your wife sign it?

A. Yes, sir.

Q. Did you see Mr. Lackey sign it?

A. No, sir, I don't think I remember seeing him sign it.

Q. Did you see Mrs. Lackey sign it?

A. No, sir.

Q. You've never seen Mrs. Lackey's signature?

A. Not to my recollection other than there.

Q. Other than there.

A. I have no way of comparing her signature.

Q. Um-hmm. Alright. Now do you agree that the sale of your home and furnishings contained in that was part of the inducement for Mr. Lackey coming to Roanoke to work?

A. No, sir.

Q. You don't?

A. I do not agree to that, no, sir.

Q. You deny it?

A. I deny that.

Q. Alright. When you discussed the home, the sale of the home, and the sale of the furniture, weren't--were you dealing with Mr. Lackey?

A. That's correct.

Q. Alright. Now after the sale of the home, do you recall signing certain documents stating that Mr. Lackey had in fact fulfilled his obligations to you and in fact had paid you all the monies that he owed?

A. No, sir.

Q. You don't remember that?

A. I don't remember that, no, sir.

Q. Do you remember signing a document saying that he had paid you eighteen thousand dollars for the furnishings?

A. No, sir.

Q. You don't remember or you deny it?

A. I deny that I did that.

Q. Do you deny signing any documents stating that Mr. Lackey had paid money to you in escrow to satisfy his obligation, if any, for the remaining balance owed to the home?

BY MR. T. J. WILLIAMS: Your Honor, I have an objection I'd like to voice if I may. Subject to the Queen Caroline's Rule in effect in Virginia, if there are such documents in evidence, they should be presented to counsel right now so we can see them.

BY THE COURT: Well, you didn't ask for it by Discovery. Overrule your objection. Go ahead.

Q. (Mr. C. L. Williams continuing) The question I'm putting to you is do you deny that you signed any written documents?

A. I don't remember any.

Q. You don't remember?

A. I don't remember any documents.

MR. C. L. WILLLIAMS SHOWS DOUCMENT TO MR. T. J. WILLIAMS

Q. I show you this document and ask if that would jog your recollection?

A. Yes, sir. I signed that. That was given to Peoples Federal Savings and Loan to allow them to okay, which I have a copy of that letter of authorization, to assume the loan. I understood at that time that they had paid those funds in escrow to King, Fulghum, Renick, Bounds and Smith at the time of closing, which the contract stated that they were. And at that time I did not contact King, Fulghum, Renick, Bounds and Smith and therefore I did not know that this was not in fact the case.

Q. Alright. Would you read that?

A. Yes, sir. "To whom it may concern. This is to certify that Mr. and Mrs. Chet Lackey have an amount held in escrow funds by me to cover all monies due me over and above the assumption of the existing mortgage of approximately fifty thousand nine hundred."

Q. And signed?

A. Dennis--B. Dennis Costner and a signature of Dennis Costner.

Q. You signed such a document?

A. Yes, sir.

BY MR. C. L. WILLIAMS: I'd like to offer this in to evidence as Defendant's exhibit, whatever it is.

BY THE COURT: "A".

BY MR. T. J. WILLIAMS: Your Honor, I would like to ask if the original is available before that's introduced

as evidence.

BY MR. C. L. WILLIAMS: I would offer to the Court the original of that, in fact, was delivered to the banking institution and that's the evidence that we have right now, a copy being the best evidence available to the Defendant.

BY MR. T. J. WILLIAMS: Your Honor, I'll object to that then.

BY MR. C. L. WILLIAMS: And the witness had admitted it.

BY THE COURT: Overruled. The Defendant (sic) states that he did sign it and that this is a copy.

BY MR. T. J. WILLIAMS: Is that Exhibit A, Your Honor?

BY THE COURT: Yes, sir.

Q. (Mr. C. L. Williams continuing) Mr. Costner, isn't it in fact true that if Mr. Lackey were going to owe you or pay you any money over and above the assumption of the loan, that it was going to be based on some subsequent appraisal of the house?

A. No, sir.

Q. It was not?

A. No, sir. I had the house appraised to--to ease my own mind as to the correctness of the price, after I'd stated the price, and after that appraisal was made then I was--I felt like that price was a fair price.

Q. Okay. To make sure though, you have testified that were no additional notes signed other than--there have been no notes signed from Mr. Lackey or Mrs. Lackey over to

you or your wife?

BY MR. T. J. WILLIAMS: Your Honor, he would not know that. All he could testify to is to his knowledge.

BY MR. C. L. WILLIAMS: Well, that's right, to his knowledge.

A. (Witness continuing) I don't remember. There may have been but I don't remember there being.

Q. With connection with the furniture or the home?

A. The real estate, no, I don't remember that.

Q. With re--with respect to the payments that may have been made to you pursuant to this alleged contract to cover the deficiency on the home, did you ever accept any offsets, credits, or other payments, other than cash, from Mr. and Mrs. Lackey?

A. I was told that an expense account to IME would be assigned to me. Of course, I've never been paid that since it's been in bankruptcy, no, sir. That's the only other one that occurred.

Q. How much was that?

A. I don't remember the exact amount, seems like it was five hundred and thirty-five dollars or something like that.

Q. Alright, I don't have any other questions.

BY MR. T. J. WILLIAMS: I have no further questions, Your Honor.

WITNESS STANDS ASIDE

BY MR. C. L. WILLIAMS: Your Honor, may I make a motion?

BY MR. T. J. WILLIAMS: I'm not through with my presentation.

BY MR. C. L. WILLIAMS: Oh, I'm sorry, go ahead.

BY MR. T. J. WILLIAMS: Your Honor, we would like to call to the stand Mr. Chester Lackey as an adverse witness.

BY MR. C. L. WILLIAMS: Judge, this witness hasn't been summonsed.

BY MR. T. J. WILLIAMS: He's here in Court, Your Honor--

BY THE COURT: He's an adverse party whether he's summoned or not. Call him in, go ahead.

CHESTER LEE LACKEY, A WITNESS OF LAWFUL AGE, HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION
BY MR. T. J. WILLIAMS:

Q. Mr. Lackey, have you been sworn?

A. Yes, I have.

Q. Mr. Lackey, what is your full name and address?

A. Chester Lee Lackey, 9602 Clearbrook Drive, Huntington Beach, California.

Q. How long have you resided at that address?

A. Approximately six months. Well, not that long, about five months, I guess. Since--March, April, May, June, July--four months, I'm sorry.

Q. You went to California then in March of Seventy--

A. That's correct.

Q. Do you recall the day?

A. No, I was--I made several trips to California.

I actually moved my family the 1st of April but I was there prior to that after I resigned from IME.

Q. You're presently residing in California?

A. That's correct.

Q. Mr. Lackey, when were you first employed by IME?

A. About September of last year.

Q. Mr. Lackey, were you at your residence when the Sheriff for the County of Roanoke came out to make a levy?

A. That's correct.

Q. Did you see the Sheriff?

A. Yes.

Q. Did you talk to him?

A. Yes.

Q. Did he in fact make an attachment levy on certain articles of property in that residence?

A. I knew he was coming, I knew it was going to happen, Dennis had threatened it a couple of times; physically threatened me and verbally threatened me. He--I left all of Dennis's furnishings in the house.

Q. Now, I just want to ask my questions, on cross examination and on direct, you'll have a chance to do that but I just asked the question if you saw him make a levy on certain items of personal property?

A. Yes.

Q. Did he give you a list of that item--of those

items that he levied on?

A. Yes.

Q. Mr. Lackey, I'm going to first show your counsel a copy of the document that I have and then I'll show that to you.

MR. T. J. WILLIAMS AND MR. C. L. WILLIAMS HAVE WHISPERED CONFERENCE CONCERNING DOCUMENT

Q. (Mr. T. J. Williams continuing) Mr. Lackey, I'm handing you a document and I ask you have you ever had the opportunity to see that document before?

A. Yes.

Q. Is that in fact the list the Sheriff made when he levied on those belongings at your residence?

A. Yes, it is.

Q. And when was that levy made, to the best of your recollection? If you can't, look at this and refresh your memory.

A. I looked at the date, yeah, the 23rd day of March.

Q. Does that sound right to you?

A. Sure.

Q. All those items of property were, of course, at the residence at the time the levy was made?

A. That's correct.

Q. In addition, did you receive a petition for attachment from the Sheriff?

A. For these items, yes.

Q. Were you also informed that your residence had an attachment listed against it?

A. Yes, I was.

BY MR. T. J. WILLIAMS: Your Honor, I don't think it's necessary to make a part this as an exhibit, it is already in the file as the Sheriff's return. If the Court pleases, I will make it Exhibit 2 for the Plaintiff but I don't know if that's necessary.

BY THE COURT: Well, there's one in the file, do you want that one made a copy--

BY MR. T. J. WILLIAMS: I don't--

BY THE COURT: Alright.

BY MR. C. L. WILLIAMS: We'll stipulate that that's a return of the Sheriff, appears to be marked C. B. Kane, reference number 80-1979--

BY MR. T. J. WILLIAMS: I think that's C. E. Greer. And it's a three page document for the record.

BY MR. C. L. WILLIAMS: I'm sorry. Well, one's signed by Mr. Greer and one's signed by Mr. Cain?

BY MR. T. J. WILLIAMS: That's correct.

Q. (Mr. T. J. Williams continuing) Mr. Lackey, are these items of furniture still at the residence?

A. No, they're not.

Q. Have they been moved to a storage facility?

A. Yes, they were.

Q. Are all of the items intact in storage facility?

A. Yes, they are.

Q. Mr. Lackey, does that include the automobile that was levied on?

A. No, the automobile was sold prior to the levy and it's recorded in the capitol and was sold--

Q. Answer my question. Is the automobile in the State of Virginia?

A. No, it isn't.

Q. It was levied on on March 23rd, 1978--'79?

A. No, it wasn't. I think it was after that date that it was levied on, maybe it was, I didn't receive anything on the car.

Q. Well, now the document I just gave you shows the automobile, am I incorrect, on page two?

A. I didn't see it on there, maybe it is. The automobile was sold the 14th of March.

Q. Well now, I didn't ask that question. The question I'm asking is does the automobile appear on that sheet?

A. Yes, it is.

Q. And was it levied on by the Sheriff at the time?

A. Yes, it was.

BY MR. T. J. WILLIAMS: Your Honor, I think will mark this as Exhibit 2 to clear up any confusion in the record.

MR. T. J. WILLIAMS AND MR. C. L. WILLIAMS HAVE WHISPERED CONFERENCE

BY MR. T. J. WILLIAMS: Your Honor, we have some confusion. Does the Court's file show on page two of the levy that the vehicle had been levied on?

BY THE COURT: All is in the file is what purports to be a mimeographed or photographed copy of the original, I don't know. Also, the Court would be interested to have some information whether the appropriate bond was executed at the time of the levy, that doesn't show in here either. I don't know whether the Plaintiff gave a bond for the levy or not.

BY MR. T. J. WILLIAMS: Your Honor, I think I can address myself to that question in just a minute.

BY THE COURT: Alright.

BY MR. T. J. WILLIAMS: I would like that marked as Exhibit 2.

Your Honor, if I may take just a minute to tell the Court about this. No bond has been posted and therefore possession of the goods was not asked for at that time. The Answer was not sworn to as a substantial defense and therefore nor bond was requested at that time. And so to answer the Court's question, a bond has not yet been posted, nor have we been notified that it's necessary and since we have not asked for possession prior to--

BY THE COURT: Well, I believe the law of Virginia requires it and that's a matter between you and the Sheriff, I don't know anything about that.

Q. (Mr. T. J. Williams continuing) Mr. Lackey, refer your attention back, we were just talking about the levy and you said that you'd seen the Sheriff out there levying on various personal property. This automobile, would you describe it, please?

A. It's a Mercury, 1979 Mercury.

Q. Where is it now?

A. It's in Oklahoma.

BY THE COURT: This isn't the original yet, where is the original?

BY MR. T. J. WILLIAMS: Your Honor, the original is not available to us, we don't have it; and if it's not in the Court's file, then the Sheriff must have the original.

BY THE COURT: I don't know. It isn't up to the Court to be running around looking for it; I think it's up to the Plaintiff to produce it. Anyway that's--all I've got's a copy of the purported levy.

Q. (Mr. T. J. Williams continuing) Mr. Lackey, Exhibit 1, which I have here, I'm showing it to you, previously marked Plaintiff's Exhibit Number 1. Have you seen that document before?

A. I don't recollect seeing this at all, no.

Q. Do you see on page two a signature line for you?

A. Yes.

Q. Is that your signature?

A. It amazes me that Dennis could recognize the signature when I always sign by name Chet Lackey--

Q. Now I asked the question--

A. I don't remember signing this, no.

Q. I asked the question "is that your signature?"

A. I don't remember signing this, no.

Q. I did not ask the question do you remember signing it--

BY THE COURT: Answer the question if it's your signature or not, sir.

BY THE WITNESS: Well, Your Honor, I--I apologize, I have difficulty understanding, if I don't remember signing it, how could--does it look like something I--that--my signature?

BY THE COURT: Well, I don't know--

BY THE WITNESS: Yes, it resembles my signature, yes, Your Honor.

BY THE COURT: --that's up to you.

BY THE WITNESS: Yes, it resembles my signature but I always sign "Chet Lackey" on just about everything that I sign, not "Chester Lee" in fact, I can't imagine Dennis ever seeing anything I signed Chester Lee.

Q. (Mr. T. J. Williams continuing) Well, nevertheless, are you testifying or will you testify to the Court that is not your signature?

BY MR. C. L. WILLIAMS: I believe he's testify he can't identify it as his signature.

BY MR. T. J. WILLIAMS: Well, I want to hear that from him.

A. (Witness continuing) I cannot identify that as my signature.

Q. Does your signature look like that?

A. No.

Q. Your signature does not look like that?

A. I don't sign my full name, no.

Q. I--alright, let me ask you this question so you can get it out. Do you sign Chester Lee Lackey?

A. No.

Q. We're through with that question. Let me ask the right question. The question is, when you sign Chester Lee Lackey, do you sign it that way?

A. That looks like my signature, yes.

Q. Do you recognize your wife's signature?

A. I--let me--I--I couldn't say one way or the other, I haven't seen her sign that many documents.

Q. How long have you been married to your wife?

A. Three years.

Q. Have you seen her signature over those three years?

A. I'm sure that through the time I may have seen it, yes.

Q. Does she have an "e" on the end of her name?

A. Is Suzanne spelled with an "e", no.

Q. Now this document, although it has an "e" on the print, on the actual signature it does not have an "e":

does that help you in determining whether that's her signature or not?

A. Someone spelled the name the same as she spells her name.

Q. But you can't testify that this is her signature?

A. No, I couldn't.

Q. Are you testifying that it is not her signature?

A. No, I couldn't do that either, I don't know.

Q. Mr. Lackey, did you sign a note for either the amount due on the real estate or for the amount due on the personal property?

A. No, sir.

Q. Your Honor, I have no further questions.

CROSS EXAMINATION
BY MR. C. L. WILLIAMS:

Q. One question, sir. I show you a package of papers, can you identify that? Are they the papers the Sheriff served on you when he attached?

A. Yes.

Q. In their entirety?

A. It was a very confusing day, as far as I know this is--yeah, this is everything that we had.

Q. Alright. And I show you three pages, which the Sheriff purported to make a list--

A. Um-hmm.

Q. Right?

A. Yes.

Q. One that appears to be an original--

A. Yes.

Q. --being a pink sheet--

A. Um-hmm.

Q. --and two others--

A. Um-hmm.

Q. --appearing to be carbon copies, a white sheet and a yellow legal page, okay? Now is there any vehicle identified on any of those pages?

A. No, sir.

BY MR. C. L. WILLIAMS: I'd like to submit this as Defendant's Exhibit B.

Q. (Mr. C. L. Williams continuing) Did the Sheriff serve any other documents on you the day--

A. No.

Q. --he levied?

A. No, no.

Q. Have you stored all the furnishings that the Sheriff levied on?

A. Yes, I did.

Q. And where are they now?

A. They're in Garst Moving Furniture and Storage. Mr. Costner knew that because he called them up and tried to get them to move'em to South Carolina for him.

Q. Okay. But it is there?

A. Yes, absolutely.

Q. Thank you, no further questions.

BY MR. T. J. WILLIAMS: Just a minute, Your Honor. Your Honor, we have no further questions of this witness.

BY MR. C. L. WILLIAMS: Thank you, step down.

WITNESS STANDS ASIDE

BY MR. T. J. WILLIAMS: Your Honor, we have no further evidence to present at this point. I do want to make one point. The original of this attachment is generally given to the Defendant. In this case at least part of the original was given to the Defendant. I don't know where the rest of it would be.

BY THE COURT: Well, I don't either and the file indicates that "Not finding Chester Lee Lackey on March the 21st, a copy was delievered to his wife." I see no return that they ever did find him when the levy was made.

BY MR. T. J. WILLIAMS: Well, Your Honor, I think if you check the file, you'll see that on the 21st the Sheriff went out there and then again on the 23rd. He went out two separate times, once to serve the suit and second to make the attachment.

BY THE COURT: Well, the suit was for the attachment.

BY MR. T. J. WILLIAMS: Yes, sir.

BY THE COURT: Now then I don't know--can you explain why the Verifax copy of the levy in the file contains the automobile and this one doesn't?

BY MR. T. J. WILLIAMS: Your Honor, I got my copy from the

Sheriff's files, himself. He did not have the original at the time, he only had a copy from which I copied my copy. I cannot explain that and if I'm given a brief recess, perhaps I can find Deputy Greer and find out.

BY THE COURT: All right, sir. And also find out--I'd like to know why he levied at all without the required bond being posted at the time of the levy. Otherwise we don't have a levy, as far as I'm concerned.

BY MR. T. J. WILLIAMS: Your Honor, if I may, I will present the Code of Virginia that would allow that in certain instances.

BY THE COURT: Without a bond?

BY MR. T. J. WILLIAMS: Yes, sir.

BY THE COURT: All right, I'd like to see it.

BY MR. T. J. WILLIAMS: May I have about a ten minute recess?

BY THE COURT: Yes, sir.

THE COURT TAKES A SHORT RECESS

THE COURT RECONVENES

BY THE COURT: Are you gentlemen ready to proceed?

BY MR. C. L. WILLIAMS: Yes, sir.

BY MR. T. J. WILLIAMS: Your Honor, I would like to call one more witness.

BY THE COURT: All right, sir.

BY MR. T. J. WILLIAMS: We would like to call to the stand Deputy Greer.

BY THE COURT: All right, sir.

WITNESS DULY SWORN BY THE CLERK

BY MR. T. J. WILLIAMS: Your Honor, if I may have Exhibit 2 for the Plaintiff.

CHARLES GREER, A WITNESS OF LAWFUL AGE, HAVING BEEN FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION
BY MR. T. J. WILLIAMS:

Q. Deputy Greer, would you please give your full name.

A. Lieutenant. Charles Greer.

Q. I'm sorry, Lt. Greer. Lt. Greer, what is your occupation?

A. Deputy Sheriff of Roanoke County, I work in Civil Division.

Q. How long have you been in that Civil Division?

A. About twelve years.

Q. Lt. Greer, I direct your attention to March 23rd of 1979. Do you recall making an attachment levy on the possessions of one Chester Lackey and Suzanne Lackey?

A. Yes, sir, I do.

Q. Were you accompanied by another deputy?

A. Yes, sir, I was.

Q. Who was that?

A. Deputy Kane.

Q. Deputy--Lt. Greer, I hand you a document that's previously been marked as Exhibit 2 for the Plaintiff. I'll ask you to look at these three sheets of paper.

WITNESS EXAMININES PLAINTIFF'S EXHIBIT 2

Q. And ask you if you would identify those.

A. The first one is the levy form that I filled out myself.

Q. On the possessions of Chester Lackey?

A. Yes, sir. Yes, sir.

Q. And the second sheet?

A. The second sheet is one filled out by Deputy Kane.

Q. Is that Deputy Kane's signature?

A. Yes, sir, it is.

Q. Do you recognize it from years of working with him?

A. Yes, sir.

Q. And the third sheet?

A. It's more that was filled out that belongs with the first one--

Q. With yours?

A. --or the second one, that belongs with Kane's, Sgt. Kane's.

Q. So Sgt. Kane filled that one out?

A. Yes, sir, he did.

Q. Do you recall a levy being made on a 1979--

BY THE COURT: Are they originals, Lt., or copies?

BY THE WITNESS: These are copies, Your Honor.

BY THE COURT: All right. Where is the original?

BY THE WITNESS: They're in the officer's box downstairs.

BY THE COURT: They're where?

BY THE WITNESS: They're downstairs. I could produce them.

BY THE COURT: Well, I think that's what I'm interested in seeing.

Q. (Mr. T. J. Williams continuing) Could I ask you to go get those and bring them back immediately, please.

A. Yes, sir, yes, sir.

BY MR. T. J. WILLIAMS: Your Honor, I'm sorry for this, I thought that the originals were in the possession of the Lieutenant.

BY THE COURT: Well, I think it's material because there is a variance between what you have and what was presented as Defendant's exhibit.

WITNESS LEAVES THE COURTROOM TO GET PAPERS

BY MR. T. J. WILLIAMS: Your Honor, if I may at this time take up the second question you asked me, you asked me about the bond and I have authorities for Your Honor from Mickie's Jurisprudence and the Code of Virginia that say that the only time a bond is required is when the Plaintiff asks for immediate possession or when the Defendant in his Answer says he has a substantial defense and swears to it by affidavit. Then a bond must be posted within ten days.

BY THE COURT: I thought your position was that the furniture had been moved and stored which was in violation of the attachment as well as the automobile being

removed. And that's why I'm asking if the bond was required. I don't doubt that you can have the attachment but you do not have any control over the attached property unless a bond is posted.

BY MR. T. J. WILLIAMS: Well, we--we'll consent to that, Your Honor. We certainly can't take the attached property unless the bond is posted.

BY THE COURT: That's correct. That's what I thought you were complaining about.

BY MR. T. J. WILLIAMS: We--the complaint actually centers on the automobile, Your Honor. If it's moved out of the State of Virginia whether bond's posted or not, there is a likelihood it cannot be recovered.

BY THE COURT: Well, I don't know. But if you wanted the Sheriff to take possession as I undersood it, you'd have to post your bond.

BY MR. T. J. WILLIAMS: That's cleared up then, Your Honor, thank you.

BY THE COURT: Well, I'm still interested to know why the automobile is listed on one which you have filed and not listed on this one that was introduced as an Exhibit.

BY MR. T. J. WILLIAMS: Your Honor, off the record, I think I can explain that but it'll be coming up on testimony.

BY THE COURT: Well, we'll see what the original says.

BY MR. T. J. WILLIAMS: Alright, sir.

BY THE COURT: While we're waiting, what is your position as to the levy on the real estate?

BY MR. T. J. WILLIAMS: Your Honor, the levy on the real estate has been described or should have been--has been described on some of these documents.

BY THE COURT: I haven't seen it.

BY MR. T. J. WILLIAMS: A Memorandum of Lis Pendens was filed or Memorandum of Attachment, excuse me. When we get the original, Your Honor, it will be evident. As a factual matter that matter would be moot anyway, Your Honor, Peoples Federal's foreclosing the first deed of trust.

BY THE COURT: Well.

BY MR. T. J. WILLIAMS: Your Honor, with the Court's permission I'll take a minute and see if I can't find Deputy Greer.

BY THE COURT: I don't know where he is.

WITNESS RETURNS TO THE WITNESS STAND

BY MR. T. J. WILLIAMS: Your Honor, we'll make a preliminary statement. We've gone--the deputy will say that he's gone through all the notices and he can't find it. His only recollection could be that it might be in the Court's file itself. If not there, the document has not been found, the original.

BY THE COURT: Well, here is the Court file if you'd like to examine it.

BY MR. T. J. WILLIAMS: If I may.

MR. T. J. WILLIAMS EXAMINES COURT FILE

BY MR. T. J. WILLIAMS: There is something helpful here, Your Honor. The original is not here but I think for purposes of oral testimony from the witness I'd like to use this file briefly.

BY THE COURT: All right, sir.

Q. (Mr. T. J. Williams continuing) Deputy Greer, do you recall going out on March 23rd, 1979, and making a levy on the property of Mr. Chester and Suzanne Lackey?

A. Yes, sir, I do.

Q. And you were in the company of Deputy Kane, I believe it is?

A. Yes, sir.

Q. Did you make a levy?

A. Yes, sir.

Q. Deputy Kane, I've previously given you--Deputy Greer, I've previously given you what is Plaintiff's Exhibit number 2. Did you identify that as the levy that was made by yourself and Officer Kane?

A. I did.

Q. There's been some question about the levy on the automobile. Do you recall a levy being made on the automobile listed on page two of Exhibit 2?

A. Yes, sir, I do.

Q. Would you tell the Court the circumstances of that levy?

A. At the time me and Officer Kane was at the residence, we checked the license out that was on the car and it was found to be listed in his wife's name, so Officer Kane went back and made the levy on the car later on that evening.

Q. Went back? The first time you were there was an attempt to levy on the car made?

A. Yes, sir, seemed like we talked to both subjects and they said it was registered in the mother's name, I believe.

Q. Did you make a levy at that time?

A. No, sir, we didn't at that time.

Q. Why didn't you make the levy at that time?

A. We didn't have the information back on the car at that time is the reason we didn't make a levy.

Q. So then you returned and checked out to find out who owned the car or registered the car?

A. Yes, sir.

Q. And after you found out it was registered, you went back?

A. Yes, sir. Officer Kane went back and levied on the car.

Q. Did he bring the levy back to the office?

A. Yes, sir.

Q. Did you see the levy?

A. Yes, sir, I seen it the following morning after he had made the levy.

Q. The levy that you saw, to the best of your recollection is this a true copy of it, page two?

A. Yes, sir. Yes, sir, that is a copy of it.

Q. Do you know where the originals of these documents might be, Deputy Greer?

A. Captain Meador could possibly have them, I'm not sure.

Q. Could you find them in your documents, in your out box?

A. No, sir, I could not.

Q. And you've not filed them with the Clerk of the Circuit Court?

A. No, sir.

Q. Could you have given them to the Plaintiff? I mean, excuse me, the Defendant in this case, Mr. and Mrs. Chester Lackey?

A. No, sir, we usually give them a carbon copy.

Q. To the best of your recollection at the present time, you do not know where the originals are?

A. No, sir, I do not.

Q. This levy, particularly page two of the Exhibit 2 that you've got in front of you, these records are kept in the ordinary course of your business?

A. Yes, sir.

Q. It is your duty in fact to keep these documents, is it not?

A. Yes, sir.

Q. Your Honor, I have no further questions of this witness, he's subject to cross examination.

CROSS EXAMINATION
BY MR. C. L. WILLIAMS:

Q. You actually were not present when the levy was made on the automobile?

A. No, sir, I was not.

Q. And you talked about--you testified about information, verification of the ownership of the automobile?

A. Yes, sir.

Q. You testified about that?

A. Yes, sir.

Q. Did you verify the ownership of the automobile through a telephone discussion with the Division of Motor Vehicles in Richmond?

A. Through a teletype through our office.

Q. And you have no documents with you showing the teletype results?

A. No, sir, it's with the original papers, there's a copy of it with the original papers.

Q. You don't know whether Mr. Lackey was ever served with any evidence that the automobile in question was levied on?

A. No, sir, I was not with the Officer who served it.

Q. Thank you, sir.

BY MR. T. J. WILLIAMS: I have no questions if the Court has

no question, Your Honor, we'll dismiss this witness.

BY THE COURT: Lt., the Order of Attachment directed the Sheriff to levy on Lot 1, Block 1 as well, there's no return of any such levy in the file. Was any such levy made?

BY THE WITNESS: Yes, sir. Of all the copies that we have here, one was made, what happened to it I don't know.

BY THE COURT: Well, there's a copy on the back of the Order, copy of the Order, which is a return filled out and blank but not executed. And also I hand you what the Defendant has presented as a copy of the levy presented, given to him and I'll ask you if there's any notation whatsoever thereon about the automobile?

BY MR. T. J. WILLIAMS: Your Honor, may I approach the witness and look?

BY THE COURT: No, sir, the witness can answer my questions.

BY MR. T. J. WILLIAMS: Yes, sir.

BY THE WITNESS: No, sir, it isn't.

BY THE COURT: I believe a copy is required to be delivered--

BY THE WITNESS: Yes, sir.

BY THE COURT: --to the person who owns the property at the time of the levy?

BY THE WITNESS: Yes, sir.

BY THE COURT: All right, sir. Now you can ask him anything you wish.

REDIRECT EXAMINATION
BY MR. T. J. WILLIAMS:

Q. One further question, Lt. Greer. Do you recall a levy actually being made on the real estate?

A. Yes, sir.

Q. Did you go out to make the levy?

A. Yes, sir. On the personal property/real estate Officer Kane was the officer that went back out on the real estate. On the personal property is the only one that I was involved.

Q. You did the personal property, Officer Kane did the real estate and the vehicle?

A. Yes, sir.

Q. Do you recall any discussion between yourselves and Captain Meador or Officer Kane about the levy on the real estate?

A. No, sir, I do not.

Q. I have no further questions, thank you, Lt. Greer.

BY THE COURT: All right, sir. Everybody finished with the Lt.?

BY MR. C. L. WILLIAMS: Yes, sir.

BY THE COURT: Thank you, sir.

WITNESS STANDS ASIDE

BY MR. T. J. WILLIAMS: Your Honor, that's the conclusion of the Plaintiff's evidence in this case.

BY MR. C. L. WILLIAMS: Judge, will you hear a motion?

BY THE COURT: Yes, sir.

BY MR. C. L. WILLIAMS: First, may it please the Court, on behalf of the Defendants, Mr. and Mrs. Lackey, we respectfully move the Court to rule that there has been no valid attachment on several grounds. One, the Plaintiffs' evidence fails to establish that any grounds for attachment as set forth in Section 8.01-534 exists. The burden is on the plaintiff to prove at least one of the six grounds set forth in that statute and none have been proved. Secondly, we would rule that with respect particularly to the automobile and the real estate that inasmuch as neither of the Defendants were served with the appropriate documentation that there is particularly no attachment to those even if the grounds did exist. And so for those reasons, we would ask that the attachment be dismissed and, therefore, the lien be declared void by the Court. Secondly, we would move the Court to strike the evidence on the gr--does the Court want to rule on any of these motions or do you want to here me out on all at one time?

BY THE COURT: Just make them all.

BY MR. C. L. WILLIAMS: All at one time. Alright. Next, we would move the Court to strike all of the evidence against Mrs. Lackey on the gr--to the extent that she is not--was not properly levied the attachment

on the prior grounds. And secondly, on the grounds that the evidence thus far is inadequate to prove that she is indebted to the defendant (sic) either for the furniture or particularly for the furniture or for the--any deficiency or balance due on the real estate. With respect to the furnishings, at best, and we don't concede there's a contract, but at best it's an oral contract between Mr. Lackey and Mr. Costner. With respect to the real estate, we would refer the Court one and take the position that the contract, a written contract, has not been proved. Mr. Costner has not testified with sufficient certainty to establish that Mr. and Mrs. Lackey even signed the contract. Mr. Lackey does not admit his signature, nor does Mrs. Lackey admit a signature. There have been no requests for admissions and we would submit that the evidence thus far is inadequate to establish a written contract for the sale of real estate. I believe under the Statute of Frauds an oral contract for the sale of real estate is unenforceable. So for those reasons we would ask the Court to strike the evidence on all grounds against Mrs. Lackey.
As to Mr. Lackey we would also move the Court to strike the evidence in that evidence that would justify an attachment again has not been produced. Any evidence to support an underlying claim on the

real estate contract, again, we believe that a claim would be barred because there is no valid written contract proven; and particularly Mr. Costner's own acknowledgement that if any monies were due, that they were in fact paid. And secondly, with respect to the furnishings, we would submit that the evidence before the Court thus far is inadequate to sustain the claim for breach of contract against Mr. Lackey.

BY MR. T. J. WILLIAMS: Your Honor, responding to the two prongs that I believe Mr. Williams has raised. First the questioning as to the attachment. I think that in the case of personal property listed in those three sheets, there's been no question and no objection to the evidence, as I may say, as to the items listed in there except for the car. As to the items at least the attachment should be--should be sustained. As to the vehicle, the deputy has testified from the business records of the County of Roanoke and by law that that vehicle was levied on and he's relayed to the Court how he levied on it. As to the real estate all I can say is that the officer said that real estate had been levied on, there's nothing in the file to indicate that but nevertheless the Memorandum's been filed. But certainly as to the personal property, there's seems to be no question that the

Defendants received notice of that; and no question that the levies were made and these are true and accurate copies. As to the originals, I can't produce them because the Sheriff's office can't produce them. I don't know where they are.

As to the substative matter, aside from the attachment, this Court knows even if instructed the attachment has the right to go ahead and determine the issues. Suffice it to say that Mrs. Lackey was sued, the testimony from Mr. Costner did state that he sold the property and the real estate to Mr. and Mrs. Lackey. The Statute of Frauds question is answered as to the real estate by the contract as Exhibit 1 itself, which is, of course, a writing although undated is October 1978 and signed by the parties. It's not been denied that those are the parties' signatures. Secondly, the Statute of Frauds never applies anyway after performance of the contract. If in fact the real estate is conveyed, then the real estate must either be surrendered or the consideration paid fully. One can not plead the Statute of Frauds after one party has performed his contract; otherwise, the whole theory of unjust enrichment never would have been born in this country or England. And thirdly, the Statute of Frauds hasn't even been pleaded.

Now we also say that Lackey has the property, the

property was found on the premises and the property was levied on. Obviously, it's up to him to show how he came by that property if not by the Plaintiff. Now I think essentially for what I have said, the property--the Statute of Frauds clearly is inapplicable in view of a written contract and in view of the fact the contract has been performed by the Plaintiff. And as for the attachment, the personal property at least, in addition to the vehicle, should be sustained. Thank you.

BY MR. C. L. WILLIAMS: Your Honor, would you hear me on one other point in rebuttal to that?

BY THE COURT: Yes, sir.

BY MR. C. L. WILLIAMS: If the Court please, refer to the Petition for Attachment. On the point of the real estate I think we have bifurcated issues here. The Plaintiff in his Petition for Attachment states that the obligation for the eighty-nine hundred and eighty-seven dollar and ninety-eight cent loan, being the difference--being the difference in the amount assumed and the amount due for the purchase of the real estate was by reason of or by virtue of an unsigned note that they attached and not by reason of any contract which they've produced here today. It's the issues that are set forth in the pleadings that we're here to contend with today. We simply would take the position that an

unsigned note creates no obligation. And that other than an unsigned note, this is a contract for the sale of real estate which was verbal in nature and the parties have performed all that they are due to perform thus far. So we feel that the motion to strike on the underlying claim for debt due on the real estate transaction should be sustained.

BY MR. T. J. WILLIAMS: Your Honor, in reply to that. At careful reading of paragraph four on page two, will show that the suit is not on the note which is unsigned and hasn't even been introduced in to evidence because of that, it is only witnessed by an unsigned note. And I think there's a substantial difference between suing on a note and simply buttressing the evidence with an unsigned note.

BY THE COURT: In the first place, the Court calls attention to the fact that the original documents are not in the file, nor have they yet been produced before the Court. There are what purports to be two separate copies of the attempted levy or purported levy. No problem is arising concerning the failure of the Sheriff to take possession of the property on which the levy was made as no bond was posted requiring the Sheriff to do so. Nevertheless, the levy necessarily depends upon the debt being established to carry out the effect of the levy.

There has been produced Defendant's Exhibit A which specifically states "Mr. and Mrs. Chet Lackey have an amount held in escrow funds by me to cover all monies due me over and above the assumption of the existing mortgage of approximately fifty thousand nine hundred dollars." There is no explanation presented to the Court other than the document which is an admission of the payment of the entire amount due. Therefore the debt is not established as being owed by the Defendants. In addition, the evidence of the Defendant, Mr. Lackey, called as an adverse party, the Plaintiff is necessarily bound by it unless contradicted, the Court has heard no evidence contradicting. Consequently, the motion is sustained, the levy discharged, and the case dismissed.

BY MR. T. J. WILLIAMS: Your Honor, between one and two, that is the real estate--

BY THE COURT: The real estate has never been levied on according to the documents produced before the Court, there's no return showing a levy.

BY MR. T. J. WILLIAMS: But, Your Honor, you didn't address the problem of the personal property, that is the furniture.

BY THE COURT: That is discharged because the debt on which the levy was based has not been established. In fact there is a complete statement by the Plaintiff

that the--all monies due have been paid.

BY MR. T. J. WILLIAMS: That related to the real estate, Your Honor, I think.

BY THE COURT: It didn't say that. It says "all monies due me" which, I take it, means what it says. It's an acknowledgement of all debts having been paid. This motion is dismissing the whole thing, personal, real, and the suit itself.

THESE WERE ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF THIS CASE

WITNESS this Agreement made this _____ day of October, 1978, between BARNEY D. COSTNER and REBECCA C. COSTNER, residing at the Patrick Henry Hotel, Roanoke, Virginia, hereinafter called the Sellers, and CHESTER LEE LACKEY and SUZANNE LACKEY, residing at Sweetburn Avenue, Roanoke City, Virginia, hereinafter called the Purchasers.

1. Sale. Sellers agree to sell and convey and the Purchasers agree to purchase all that certain lot, piece or parcel of land with the buildings and improvements thereon, erected, situated, lying and being in Roanoke County, Virginia and more particularly described as follows:

Lot 1, Block 1, plat of Section 1, Meadow Wood Estates.

2. Purchase price. The purchase price is Fifty-Nine Thousand Dollars ($59,000.00) payable as follows:

(a) The assumption of a first deed of trust held by Peoples Federal Savings & Loan Association in the original amount of $51,100.00;

(b) The payment of the difference between the assumption in (a) and $59,000.00 in cash at the time of closing.

3. Title conditions. The premises are sold and are to be conveyed subject to:

(a) Zoning regulations and ordinances of the County of Roanoke;

(b) Any easements and restrictions of record;

(c) Any facts an accurate survey may show.

4. Items to be apportioned.

(a) Real estate taxes for the year;

(b) Premiums on existing transferable insurance policies or renewals of those existing prior to the closing;

(c) Fuel, if any.

5. Deed. The deed shall be a general warranty deed with English covenants.

6. Fixtures and personal property. All fixtures and articles of personal property attached or appurtenant to or used in connection with the premises are represented to be owned by the Sellers, and are included in this sale. Without limiting the generality of the foregoing, such fixtures and articles of personal property include plumbing, heating, lighting and cooking fixtures, air conditioning fixtures and units, ranges, refrigerators, radio and television aerials, bathroom and kitchen cabinets, mantels, doors, windows, venetian blinds, shades, screens, awnings, storm windows, window boxes, storm doors, mail boxes, weather vanes, flagpoles, pumps, carpeting and shrubbery.

7. Closing. The closing of this transaction shall be at the law offices of King, Fulghum, Renick & Bounds, 112 West Kirk Avenue, Roanoke, Virginia on October 18, 1978, or as soon thereafter as possible.

8. Risk of fire loss. The risk of loss or damage to the premises by fire until delivery of the deed is assumed by the Sellers.

IN WITNESS WHEREOF, this contract has been duly executed by the parties hereto.

Barney D. Costner

Rebecca C. Costner

Rebecca C. Costner

Chester Lee Lackey

Chester Lee Lackey

Suzanne Lackey

Suzanne Lackey

PLAINTIFF'S EXHIBIT 2

PLAINTIFF B. Family Republic Corporation REF. #

DEFENDANT Chester Lee Sussine Jackey

LOCATION OF PROPERTY 0-5-0-3 Street Ferndale N.W. Roanoke, Va

Pursuant to a Writ of Attachment issued by the Circuit Court Court of Roanoke County, Virginia, I have on this 25 day of March 1979 at 3:15 P.M. levied on the following property; said property not to be removed, sold or disposed of in any manner until satisfactory settlement is made in the above case; to do so is in violation of Section 18.2-101 of the Code of Virginia, which may make you liable to a charge of larceny.

ITEM #	ARTICLE	QUAN.	ITEM #	MISCELLANEOUS	QUAN.
	LIVING ROOM		26	Silver	
1	Sofa	1	27	Dining Room table & Chair	
2	Occas. Chair	2	28	1 Hotel	
3	Stuffed Chair		29	Dining table & Chair	
4	Chair		30	1 Frigidaire Norge Near Fryd	
5			31	1 Bedroom Suit Queen 2 End Table	
6	Cocktail Table		32	Dresser and Mirror 2 Lamps	
7	Occas. Table		33	1 Bedroom Chair	
8	End Table		34	1 Rocky Chair 1 Lamp	
9	Lamp		35	1 Bedroom Suit Mattress	
10	Desk		36	1 Lead Table and Stand 1 Lamp	

	APPLIANCES	QUAN.	MAKE & SERIAL #	VEHICLES
11	Freezer 1 Amana			Year/Mod.
12	Piano			Make
13	Tape Recorder			Serial #
14	Stereo			Lic. #
15	Television			Seized Towed Stored
16	Air Conditioner			Place
17	Clothes Dryer			
				Year/Mod.
	OFFICE EQUIP.			Make
18	Adding Machine			Serial #
19	Arm Chair			Lic. #
20	Swivel Chair			Seized Towed Stored
21	Desk			Place
22	Filing Cabinet			
23	Typewriter			
24	Typewriter Stand			
25	Cash Register			

BOND $ _____

O. S. Foster, Sheriff

Attorney for Plaintiff _____

By C. E. [illegible]
Deputy Sheriff

§ 18.2-101. Selling, etc., of goods distrained or levied on. — If any person fraudulently sell, pledge, encumber, remove, destroy, receive or secrete any goods, chattels or other personal property of any kind whatsoever that has been distrained or levied upon, with intent to defeat such distress or levy, he shall be deemed guilty of the larceny thereof. (Code 1950, § 18.1-103; 1960, c. 358; 1975

ROANOKE COUNTY SHERIFF'S OFFICE

PLAINTIFF B. DENNIS & REBECCA CASTNER REF.# 80-1979

DEFENDANT CHESTER LEE & SUZANNE LACKEY

LOCATION OF PROPERTY 5553 SWEET FERN DR. N.W. ROE. VA.

Pursuant to a Writ of WARRANT OF ATTACHMENT issued by the ROE CO. CIR. CT. Court of Roanoke County, Virginia, I have on this 2-3 day of MARCH 1979 at 3:15 P.M. levied on the following property; said property not to be removed, sold or disposed of in any manner until satisfactory settlement is made in the above case; to do so is in violation of Section 18.2-101 of the Code of Virginia, which may make you liable to a charge of larceny.

ITEM #	ARTICLE	QUAN.	ITEM #	LIVING ROOM MISCELLANEOUS	QUAN.
	LIVING ROOM		26	Silver	
1	Sofa	1	27	~~Two~~ CILTWARE THREE	
2	Occas. Chair		28	FLOWER STAND	
3	Stuffed Chair	2	29	ONE FLOWER POT WITH	
4	Chair WOOD	1	30	FLOWER	
5			31	TWO CANDLE HOLDERS & CANDLES	
6	Cocktail Table		32		
7	Occas. Table	1	33		
8	End Table	2	34		
9	Lamp	2	35		
10	Desk		36		
	SEC. CPB.				

	APPLIANCES	QUAN.	MAKE & SERIAL #	VEHICLES
11	Freezer			Year/Mod. 1979
12	Piano			Make MERCURY 4DR. HT.
13	Tape Recorder			Serial #9Z64H624352
14	Stereo			Lic. # NPC-402-VA. 79
15	Television			Seized Towed Stored
16	Air Conditioner			Place
17	Clothes Dryer			
				Year/Mod.
	OFFICE EQUIP.			Make
18	Adding Machine			Serial #
19	Arm Chair			Lic. #
20	Swivel Chair			Seized Towed Stored
21	Desk			Place
22	Filing Cabinet			
23	Typewriter			
24	Typewriter Stand			
25	Cash Register			

BOND $ _____

O. S. Foster, Sheriff

Attorney for Plaintiff _____

By S.T.C.P. [illegible]
Deputy Sheriff

§ 18.2-101. Selling, etc., of goods distrained or levied on. — If any person fraudulently sell, pledge, encumber, remove, destroy, receive or secrete any goods, chattels or other personal property of any kind whatsoever that has been distrained or levied upon, with intent to defeat such distress or levy, he shall be deemed guilty of the larceny thereof. (Code 1950, § 18.1-108; 1960, c. 358; 1975,

FAMILY ROOM 3-23-79

1. ONE DESK
2. " END TABLE
3. " CARD TABLE & 4 CHAIRS
4. ~~T~~ ONE LEATHER CHAIR & FOOT STOOL
5. ONE VELET CHAIR
6. ONE DESK & WOOD CHAIR
7. " TABLE LAMP
8. ONE LAWMAN BULLEY ALARM
9. " WALL CLOCK
10. ONE LAMP.
11. ONE PICTURE
12. ONE ~~[illegible]~~ HANGING LAMP
13. TWO CHAIRS & TABLE - PATIO FUR. ON BACK PORCH

DEFENDANT'S EXHIBIT A

IME

International Marketing & Engineering Inc.
Roanoke, Virginia 24011

TO WHOM IT MAY CONCERN:

This is to certify that Mr. & Mrs. Chet Lackey have an amount held in escrow funds by me to cover all monies due me over and above the assumption of the existing mortgage of approximately $50,900.00.

B. Dennis Costner

Def. Ex. A
7-5-79

ROANOKE COUNTY SHERIFF'S OFFICE

DEFENDANT'S EXHIBIT B

PLAINTIFF R. DENNIS & REBECCA COSTNER REF.# 80-1975

DEFENDANT [illegible] LEE & SUZANNE LACKEY

LOCATION OF PROPERTY 5553 SWEET GUM DR. N.W. ROA. VA.

Pursuant to a Writ of ORDER OF ATTACHMENT issued by the ROA. CO. CIR. CT. Court of Roanoke County, Virginia, I have on this 23 day of AUGUST 1979 at 7:15 P. M. levied on the following property; said property not to be removed, sold or disposed of in any manner until satisfactory settlement is made in the above case; to do so is in violation of Section 18.2-101 of the Code of Virginia, which may make you liable to a charge of larceny.

ITEM #	ARTICLE	QUAN.	ITEM #	LIVING ROOM MISCELLANEOUS	QUAN.
	LIVING ROOM		26	Silver	
1	Sofa	1	27	~~TWO~~ PICTURES THREE	
2	Occas. Chair		28	FLOWER STAND	
3	Stuffed Chair	2	29	ONE FLOWER POT WITH	
4	Chair WOOD	1	30	FLOWER	
5			31	TWO CANDLE HOLDERS & CANDLES	
6	Cocktail Table		32		
7	Occas. Table	1	33		
8	End Table	2	34		
9	Lamp	2	35		
10	Desk		36		
	SEC. CAB.				

	APPLIANCES	QUAN.	MAKE & SERIAL #	VEHICLES
11	Freezer			Year/Mod.
12	Piano			Make
13	Tape Recorder			Serial #
14	Stereo			Lic. #
15	Television			Seized Towed Stored
16	Air Conditioner			Place
17	Clothes Dryer			
				Year/Mod.
	OFFICE EQUIP.			Make
18	Adding Machine			Serial #
19	Arm Chair			Lic. #
20	Swivel Chair			Seized Towed Stored
21	Desk			Place
22	Filing Cabinet			
23	Typewriter			
24	Typewriter Stand			
25	Cash Register			

BOND $_____

O. S. Foster, Sheriff

Attorney for Plaintiff_____

By S.C.I. Thane
Deputy Sheriff

Def Exh. B
9-5-79

§ 18.2-101. Selling, etc., of goods distrained or levied on. — If any person fraudulently sell, pledge, encumber, remove, destroy, receive or secrete any goods, chattels or other personal property of any kind whatsoever that has been distrained or levied upon, with intent to defeat such distress or levy, he shall be deemed guilty of the larceny thereof. (Code 1950, § 18.1-108; 1966, [illegible]

ROANOKE COUNTY SHERIFF'S OFFICE

PLAINTIFF B. Dennis Rebella Costner REF. #

DEFENDANT Chester Lee Susanne Lackey

LOCATION OF PROPERTY 5553 Sweet Fern Dr N.W. Roanoke, Va

Pursuant to a Writ of attachment issued by the Circuit Court of Roanoke County, Virginia, I have on this 23 day of March 1979 at 3:15 P.M. levied on the following property; said property not to be removed, sold or disposed of in any manner until satisfactory settlement is made in the above case; to do so is in violation of Section 18.2-101 of the Code of Virginia, which may make you liable to a charge of larceny.

ITEM #	ARTICLE	QUAN.	ITEM #	MISCELLANEOUS	QUAN.
	LIVING ROOM		26	Silver	
1	Sofa		27	1 Dining room suit 6 chairs and Hutch	
2	Occas. Chair		28	1 Dining room suit 4 chairs	
3	Stuffed Chair		29	1 Fish Bridge Mirror Footy	
4	Chair		30	1 Bedroom suit 2 End table 1 Dresser	
5			31	1 Bedroom Chair	
6	Cocktail Table		32	1 Rocker	
7	Occas. Table		33	1 Bedroom suit Dresser	
8	End Table		34	1 End table and stand	
9	Lamp		35	1 Lamp	
10	Desk		36		

	APPLIANCES	QUAN.	MAKE & SERIAL #	VEHICLES
11	Freezer	1	Amana	Year/Mod.
12	Piano			Make
13	Tape Recorder			Serial #
14	Stereo			Lic. #
15	Television			Seized Towed Stored
16	Air Conditioner			Place
17	Clothes Dryer			
				Year/Mod.
	OFFICE EQUIP.			Make
18	Adding Machine			Serial #
19	Arm Chair			Lic. #
20	Swivel Chair			Seized Towed Stored
21	Desk			Place
22	Filing Cabinet			
23	Typewriter			
24	Typewriter Stand			
25	Cash Register			

BOND $

O. S. Foster, Sheriff

Attorney for Plaintiff

By C. P. Greer
Deputy Sheriff

§ 18.2-101. Selling, etc., of goods distrained or levied on. — If any person fraudulently sell, pledge, encumber, remove, destroy, receive or secrete any goods, chattels or other personal property of any kind whatsoever that has been distrained or levied upon, with intent to defeat such distress or levy, he shall

FAMILY ROOM 3-23-79

1. ONE DESK
2. " END TABLE
3. " CARD TABLE & 4 CHAIRS
4. ONE LEATHER CHAIR & FOOT STOOL
5. ONE VELET CHAIR
6. ONE DESK & WOOD CHAIR
7. " TABLE LAMP
8. ONE LAWMAN BUCKLEY ALBUM
9. " WALL CLOCK
10. ONE CAB.
11. ONE PICTURE
12. ONE ~~CEL~~ HANGING LAMP
13. TWO CHAIRS & TABLE - PATIO FUR. ON BACK PORCH

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ROANOKE

B. DENNIS COSTNER, and REBECCA COSTNER, Plaintiffs	)	
v.	)	O R D E R
CHESTER LEE LACKEY, and Suzanne Lackey, Jointly and Severally, Defendants	)	

On July 5, 1979, the Plaintiffs and the Defendants appeared before this Court by counsel. B. Dennis Costner appeared in person as did Chester Lee Lackey.

Both sides announced that they waived trial by jury, and both sides announced ready for trial. Whereupon, the Plaintiffs presented their evidence in open Court. At the conclusion of the Plaintiffs' evidence, the Defendants, by counsel, moved the Court to strike the evidence of the Plaintiffs in support of their Petition for Attachment and claim for money judgment. After hearing arguments of counsel, the Court, being of the opinion that the motion of the Defendants should be granted, it is ORDERED that the said Motion to Strike is hereby granted and this action is dismissed for reasons more fully stated in the record of these proceedings.

It is further ORDERED that the Clerk of this Court shall certify a copy of this Order to all counsel of record upon its entry.

There being nothing further to be done in this action,

it is accordingly dismissed from the docket of this Court with the further directive of this Court that the Plaintiffs and Defendants share equally in the cost of recording the evidence and other incidents during the trial of this action.

F. L. H.

ENTER: July 18, 1979

F. L. Hoback
Judge

We have seen and request the entry of this Order:

GENTRY, LOCKE, RAKES & MOORE

By _____
Of Counsel for Defendants

A Copy Teste: Elizabeth W. , Clerk
Circuit Court, Roanoke County, Va.
By _____
Deputy Clerk

Seen and Objected to:

KING, FULGHUM, RENICK, BOUNDS & SMITH

By _____
Of Counsel for Plaintiffs

ASSIGNMENTS OF ERROR

1. The Court erred when it sustained the motion to strike at the conclusion of the plaintiffs' evidence and entered summary judgment in favor of the defendants on the grounds that Exhibit A, introduced by the defendants, was unexplained or uncontradicted by the plaintiffs when in fact Exhibit A had been explained and the Court had no other evidence upon which to base its verdict, and therefore the Court's decision was contrary to the evidence and unsupported by the evidence.

2. The Court erred when it sustained the motion to strike the plaintiffs' evidence and entered summary judgment in favor of the defendants when the Court declared that the plaintiffs were bound by the uncontradicted testimony of the adverse witness, Chester Lackey, and then failed to point out what that adverse testimony was, whether it was given within the scope of direct examination, and what effect it had upon the case.